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Supreme Court, U.S.
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No. 93-1976

In the Supreme Court of the United States

OCTOBER TERM, 1994

GARY HANEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was denied a fair trial because his attorney was precluded from discussing, in his opening statement, evidence previously ruled inadmissible, when that evidence was later admitted and counsel was afforded the opportunity to supplement his opening statement.

2. Whether petitioner was denied a fair trial by the manner in which the district court limited petitioner's attorney's ability to raise objections on behalf of petitioner's co-defendant, without restricting his ability to raise objections on behalf of petitioner.

3. Whether the district court erred in admitting testimony about a co-defendant's prior marijuana dealings, to rebut the co-defendant's defense that he had never had anything to do with marijuana.

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OPINION BELOW

The court of appeals' opinion (Pet. App. 1a-14a) is reported at 9 F.3d 1367.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1993. A petition for rehearing was denied on January 6, 1994. Pet. App. 15a. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including June 3, 1994, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Arkansas, petitioner was convicted on separate counts of conspiracy to distribute cocaine and conspiracy to distribute marijuana (21 U.S.C. 846). He was sentenced to concurrent terms of 163 months' imprisonment on each count. The court of appeals affirmed. Pet. App. 1a-14a; Gov't C.A. Br. 1, 13.

1. Petitioner participated in a drug importation and distribution conspiracy that was headed by Jerry Massey. John Turner, an undercover Customs Service Agent, penetrated the conspiracy. In taped telephone discussions between Massey and Turner involving drug deals, Massey mentioned petitioner as an accomplice. Pet. App. 8a. The evidence also showed a series of telephone communications between petitioner and Massey. *Ibid.* On July 2, 1991, Turner met with petitioner's brother, Larry Haney, to discuss marijuana distribution. During that meeting, Turner spoke with petitioner by telephone, and petitioner told Turner that an anticipated deal had fallen through. *Id.* at 3a. In connection with a December 1991 agreement for Massey to supply Turner with 40 kilograms of cocaine, Massey instructed Turner to deliver $63,000 to petitioner in an ice chest, and petitioner arranged the meeting place. *Id.* at 5a-6a. When petitioner appeared at the meeting place, he was arrested. *Id.* at 6a.

2. a. Massey was indicted with petitioner and other co-defendants, but he was incarcerated in Mexico and was not extradited to stand trial with the others. Prior to the joint trial of petitioner, petitioner's brother Larry, and two other co-defendants, the defendants were permitted to depose Massey by telephone. On direct examination during the deposition, Massey testified that

he had told petitioner and his brother that he was in the leather importing business. Massey also testified that they were not aware that he was in the drug business. Pet. App. 6a. On cross-examination, Massey asserted the Fifth Amendment privilege in response to the government's questions about the extent of the conspiracy and the contradictions between Massey's prior statements and his attempted exculpation of petitioner and petitioner's brother. See Gov't C.A. Br. 2-3.

The district court granted the government's motion *in limine* to preclude introduction of Massey's deposition testimony, and the court instructed defense counsel not to refer to it in opening statements. During trial, however, one defense attorney inadvertently referred to the deposition. After a bench conference, the government withdrew its objection to the deposition, which was then admitted. The district court then offered the defendants an opportunity to supplement their opening statements, but they declined to do so. Pet. App. 6a.

b. After petitioner rested his case, and during the government's cross-examination of petitioner's brother, counsel for petitioner attempted to interpose an objection to the questioning. The district court instructed petitioner's counsel not to register further objections to the cross-examination independently, but to consult with the brother's counsel. See Pet. App. 11a-12a. Later, out of the presence of the jury, the court clarified its ruling to explain that it had no intention of preventing petitioner's counsel from objecting on behalf of petitioner, but that counsel could not independently interpose an objection on behalf of petitioner's brother, except in coordination with the brother's counsel. *Id.* at 12a-13a.

c. When petitioner's brother testified in his own defense, he claimed that he had never been involved in

any marijuana or cocaine conspiracies. See Gov't C.A. Br. 31. On cross-examination by the government, he stated that he had never smoked marijuana with a Bradford Powell or sold marijuana to Powell. *Ibid.* The government later called Powell as a rebuttal witness to testify that Larry Haney had sold him marijuana, and that Powell had seen Larry Haney possess and use marijuana. *Ibid.*

3. The court of appeals affirmed petitioner's convictions.* It first rejected petitioner's claim that his defense was "crippled" by his inability to refer to Massey's deposition in his opening statement (Pet. App. 11a):

> Although we are inclined to believe that the district court's initial ruling that the deposition testimony was inadmissible was correct, we need not reach that issue because [petitioner has] not shown prejudice in light of the eventual receipt of the evidence. The jury was given the opportunity to consider the defense of "being duped," bolstered as it was by Massey's testimony, and the jury apparently did not believe it.

The court also rejected petitioner's argument that he was prejudiced by the district court's restriction on his counsel's ability to object to the government's cross-examination of his brother. Pet. App. 13a. Observing that the trial court has "broad discretion in the conduct of [a] trial" (*ibid.*), the court noted that the district court did not deny petitioner's counsel an opportunity to object

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* The court of appeals also affirmed the convictions of co-defendants Leon Frayer and Ambrosio Perez-Murguia, but reversed the conviction of Larry Haney for insufficient evidence. See Pet. App. 2a, 9a.

on behalf of his own client, but merely restricted counsel from objecting on behalf of Larry Haney. Moreover, even that restriction was not absolute; the court simply instructed counsel to confer with Larry Haney's counsel so that only one attorney would object on Larry Haney's behalf. *Ibid.* While the court acknowledged that the admonishment might more properly have been delivered outside the presence of the jury, it concluded that the district court's conduct did not amount to an abuse of discretion. *Ibid.*

The court did not directly address petitioner's argument that he "was prejudiced by the district court's * * * erroneous admission of * * * rebuttal evidence," Pet. App. 7a; see Pet C.A. Br. 46-49. The court appears, however, to have rejected the argument *sub silentio* in upholding the sufficiency of the admissible evidence to support petitioner's convictions. See Pet. App. 8a.

ARGUMENT

1. Petitioner argues (Pet. 17-24) that he was deprived of a fair trial when the district court ruled before trial that Massey's deposition would be inadmissible and therefore precluded petitioner's counsel from referring to the deposition in his opening statement. As the court of appeals pointed out, the lack of prejudice to petitioner makes it unnecessary to consider whether the district court's pretrial exclusion of the deposition was correct. Pet. App. 11a. Petitioner's ability to present his defense of being duped by Massey was not significantly impaired because the deposition was eventually admitted at trial, and petitioner's counsel was given the opportunity to supplement his opening statement, which he declined. The court of appeals' conclusion that petitioner was not prejudiced is fact-specific and does not warrant further review.

2. Petitioner also argues (Pet. 11-17) that he was denied a fair trial by the manner in which the district court restricted his counsel's ability to raise objections during the government's cross-examination of his brother. Petitioner characterizes the restriction (Pet. 12) as an order for counsel "to register no more objections at trial." As the court of appeals observed (Pet. App. 13a), however, the district court explained to counsel almost immediately after its ruling that the restriction was not so broad. Under the district court's ruling, petitioner's counsel was permitted freely to object on behalf of petitioner; he was restricted only to the extent that he could not object on behalf of petitioner's brother, without first consulting the brother's counsel. See *id.* at 12a-13a. That ruling was a proper exercise of discretion to limit petitioner's brother to one advocate at a time, and petitioner has not identified any matter received into evidence while counsel was under the admonition not to object that could have made a difference in the outcome of the trial. Moreover, while it might have been preferable for the court to instruct petitioner's counsel at the bench, petitioner has not suggested how the jury might have been unfairly prejudiced against him by the trial judge's directive to his attorney.

3. Petitioner maintains (Pet. 8-10) that there is a split in the circuits regarding the admissibility of evidence of prior bad acts to rebut a defendant's denial of involvement in the charged criminal offense. That issue, however, has nothing to do with this case, for two reasons. First, the evidence in question did not relate to petitioner at all, but rather concerned prior drug activity by petitioner's brother. Second, the rebuttal evidence at issue here—Bradford Powell's testimony that petitioner's brother Larry had prior dealings with

marijuana—was admitted to impeach Larry's claim that he had never had any involvement in any marijuana conspiracy, and that he had never sold or used marijuana. See Gov't C.A. Br. 31. The rebuttal evidence was properly admitted to show that Larry was not a credible witness, and not for the purpose of showing that Larry was likely to have participated in the alleged marijuana conspiracy because he had had dealings with marijuana on prior occasions.

Unlike the cases on which petitioner relies (Pet. 8-10), this case does not involve the admissibility of prior bad acts as substantive evidence under Rule 404(b) of the Federal Rules of Evidence, but rather the impeachment of a false statement by a defendant through contradiction. "The federal courts, at least in the case of a defendant-witness, have allowed contradiction by extrinsic facts even on collateral issues if the defendant falsely stated a fact on direct." 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 607[05], at 607-84 to 607-85 (1994) (footnote omitted). Even when the false statement is made on cross-examination, extrinsic evidence may be admissible to impeach the witness if the probative value of the evidence outweighs the danger of unfair prejudice. See *id.* at 607-87. "Once a witness (especially a defendant-witness) testifies as to any specific fact on direct testimony, the trial judge has broad discretion to admit extrinsic evidence tending to contradict the specific statement, even if such statement concerns a collateral matter in the case." *United States* v. *Benedetto*, 571 F.2d 1246, 1250 (2d Cir. 1978); see also *United States* v. *Bell*, 506 F.2d 207, 212-214 (D.C. Cir. 1974). Cf. *Walder* v. *United States*, 347 U.S. 62, 65 (1954) (impeaching evidence obtained in violation of Fourth Amendment admissible when, "[o]f his own accord, the defendant went beyond a mere denial of complicity in the

crimes of which he was charged and made the sweeping claim [on direct and cross-examination] that he had never dealt in or possessed any narcotics"). The evidence in question was therefore properly admitted to impeach petitioner's brother.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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